BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

JACK & ORVILLA GRAVES, LEWIS R. JONES, and PHILIP & AUDREY GUM, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and CITY OF OKANOGAN, Respondents.	PCHB Nos. 88-140, 141 & 144 ORDER AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 20, 1989, the Board entered its Final Findings of Fact, Conclusions of Law and Order.

Subsequently, counsel for respondent Department of Ecology, sought clarification of the standard applied to transfers of the point of groundwater withdrawal.

The clarification sought would change neither the reasoning or result of the decision. Moreover it does not appear to prejudice any party that such a clarification be made.

Therefore the Board sua sponte amends its decision by addition of the clarification at p. 6, lines 4 to 23. The attached Amended Findings, Conclusions and Order reflect this clarification.

DONE at Lacey, WA, this 10th day of May, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Chairman

Judith A. Bendor
JUDITH A. BENDOR, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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JACK & ORVILLA GRAVES, LEWIS R. JONES, and PHILIP & AUDREY GUM, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and CITY OF OKANOGAN, Respondents.	PCHB Nos. 88-140, 141 & 144 AMENDED FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is an appeal from Department of Ecology's approval of the City of Okanogan's application to change the point of withdrawal of certain ground water appropriation rights.

The matter came on before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge presiding. Sitting as the Board were Wick Dufford, Chairman and Judith A. Bendor, Member.

The hearing was conducted at Wenatchee on March 10, 1989. Appellants appeared by R. John Sloan, Jr., Attorney at Law. Respondent State of Washington Department of Ecology appeared by Peter F. Anderson, Assistant Attorney General. Respondent City of Okanogan appeared by Owen M. Gardner, Attorney at Law. Reporter Gene Barker & Associates provided court reporter services. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined. Post hearing briefs were filed by March 27, 1989. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns allegations by senior appropriators of ground water that changes in the point of withdrawal granted by Department of Ecology (DOE) to the City of Okanogan would result in impairment of their rights of appropriation.

II

The City of Okanogan (City) is located generally on a north-south axis alongside the Okanogan River. Although the City maintains a municipal water supply system, the system has fallen short with regard to the south end of the City. During certain times of the year the City's water system has not provided the south end with enough water for all domestic purposes, and also has not provided sufficient pressure for fire protection.

III

In order to address these chronic water problems in the south end, the City developed a Comprehensive Water System Improvement Plan. The plan called for development of a new well (known as City No. 5) in the south end of the City. City No. 5 is 94 feet deep and draws its waters (650 gallons per minute) from an underground aquifer which is in hydraulic continuity with the surface waters of the Okanogan River. Therefore, in approving City No. 5, DOE required summertime curtailment of pumping when the River reaches its administrative minimum flow.

IV

In recognition of the summertime curtailment of pumping in City No. 5, and consistent with its Comprehensive Water System Improvement Plan, the City proposed to transfer to City No. 5 the City's existing water right (350 gallons per minute) from a north end well known as City No. 1. That existing right drew its waters from the same riverside aquifer as City No. 5. However, this existing City right is not subject to summertime curtailment in respect of administrative minimum flows in the River, since that right was prior in time to those minimum flows.

V

In June, 1987, DOE tested City No. 5 using generally accepted practices, including three observation wells. From such testing, the characteristics of the aquifer in question were determined. Those characteristics are not dependent upon the time of year in which the pump tests occurred. The DOE then used the aquifer characteristics (specific yield and transmissivity), pumping rates and duration of pumping to determine hypothetical cones of influence caused by pumping City No. 5. Using a withdrawal rate of 600 gallons per minute, the pumping of City No. 5 was determined by DOE to result in the following drawdowns of water level at the following radii from the well:

RADIUS	DRAWDOWN
50 feet	3.9 ft.
100 feet	3.3 ft.
200 feet	2.8 ft.
300 feet	2.5 ft.
500 feet	2.19 ft
1000 feet	1.7 ft

VI

Errors concerning the distance between City No. 5 and the test wells were made by DOE, but were not significant in assessing the drawdown effect set forth above.

VII

In August, 1988, DOE approved the transfer of existing rights at City No. 1 to City No. 5 (350 gallons per minute, Ground Water Certificate 369-A). In September, 1988, DOE also approved transfer of City water rights in another north end well to City No. 1 (100 gallons per minute, Ground Water Certificate No. 266-D).

VIII

During August, 1988, the City pumped from City No. 5 under the rights transferred there from City No. 1 (without the curtailment in respect to minimum flows to which the transferred right was not subject). We summarize the experiences of senior appropriators during August, 1988 as follows:

> 1. Lewis Jones - domestic water right. Mr. Jones' 20 foot well in the basement of his home went dry. He drove a sand point six feet into the bottom of his well. This provided the needed water for household use.

2. Jack Graves - domestic water right. Mr. Graves' 30 foot well, used for lawn watering, went dry. He used a seven foot pipe to recover water in the well.

3. Mildred Goff - domestic water right. Mrs. Goff's 20 foot well sustained a drop in water level of five to six feet. This left water in the well, but below the foot-valve of her pump system.

4. Dorothy Archer - domestic water right. Mrs. Archer's 20 foot well used for lawn watering sustained a drop in water level below the foot-valve but did have water in the well.

5. Geraldine Pickett - domestic water right. Mrs. Pckett's 25 foot well used for home and garden sustained a drop in water level below the foot-valve, leaving water in the well.

6. Phillip Gum - irrigation water right. Mr. Gum's 27 foot well is used to irrigate 32 acres of orchard. This well went dry. Mr. Gum has obtained an estimate in the amount of $12,468 from a well driller to drill a new 90-foot well and install a new pump to provide a constant supply of water.

All of the wells described above have been in operation for 30 years or more. None has previously gone dry in the summer. The lowering of water levels described above was caused by withdrawals at City No. 5 pursuant to the right transferred there from City No. 1. The actual drawdown attributable to City No. 5 was in the range of 2 - 4 feet.

IX

Mssrs. Graves, Jones and Gum appeal DOE's approval of the water right transfers for the City of Okanogan.

X

Any Conclusion of Law deemed to be a Finding of Fact is hereby

adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Changes of point of withdrawal and place of use for groundwater rights are explicity governed by RCW 90.44.100. The primary limitations on such transfers are: (1) the new withdrawal must be from the same aquifer; (2) the original right may not be enlarged; (3) existing rights shall not be impaired.

Here the first two of these propostions are not seriously questioned. The focus is on the third -- impairment of existing rights. We believe that this standard in the transfer context must be broadly construed, consistent with the statutory concerns for comprehensive state administration of water allocation expressed in Chapter 90.03, 90.44 and 90.54 RCW, read as a whole.

We do not believe the Legislature intended for a right to be moved to a new location where a right could not have been created originally. Thus, we conclude that such transfers must conform with the water availability, beneficial use and public interest criteria which apply to the granting of new rights. RCW 90.03.290; See Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983). In short, the only thing different about moving a right from creating a right is that in the former case the priority pre-dates the application.

II

With regard to the water right transferred from City No. 1 to City No. 5 (350 gallons per minute, Certificate 369-A), appellants question neither the availability of water nor that the City's use for it is beneficial. We conclude that water is available and the City's use is beneficial and perhaps imperative. The challenged transfer is consistent with RCW 90.03.290, as applied to groundwater by RCW 90.44.060, in so far as availability of water and beneficial use are concerned.

III

Appellants do challenge the consistency of the transfer, from City No. 1 to City No. 5, with the two additional requirements of RCW 90.03.290 that (1) there be no impairment of existing rights and (2) that there be no detriment to the public welfare. In considering these we must also consider RCW 90.44.070 which provides:

> No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in a given basin, district, or locality to yield such water within a reasonable or feasible pumping lift in case of pumping developments.

and RCW 90.44.130 which provides:

> As between appropriators of public ground water, the prior appropriator shall as against subsequent appropriators from the same ground water body be entitled to the preferred use of such ground water to the extent of his appropriation and beneficial use, and shall enjoy the right to have any withdrawals by a subsequent appropriator of ground water limited to an amount

> that will maintain and provide a safe sustaining yield in the amount of the prior appropriation... . (Emphasis added.)

In essence, the issue of statutory "impairment" or related "public welfare" questions turns on the statutory phrases "reasonable or feasible pumping lift" and "safe sustaining yield". Shinn v. DOE, PCHB No. 613 (1975); Heer Brothers v. DOE and Schell, PCHB No. 894 (1976); and Heer v. DOE and Schell, PCHB 1135 (1976).

IV

The meaning of these statutes when read together is that "impairment" of an exisiting right does not occur when a junior appropriator merely lowers the water level at the site of a senior appropriator's well. Rather, senior appropriators must pursue a safe sustaining yield by deepening their wells to the point where the water level is found, but never lower than a reasonable or feasible pumping lift. Were it not so, a senior appropriator with a shallow well could deprive all others from using the available groundwater. However, we observe that where a senior appropriator, in order to obtain water, would exceed a reasonable or feasible pump lift, the senior appropriator who still is affected by a junior appropriator is then impaired. The senior appropriator would then be entitled to regulation of the junior appropriation, (or possibly an agreement by which the junior appropriator might make the senior appropriator whole, acquire the senior right or otherwise settle the matter amicably).

V

Upon the totality of the evidence before us we cannot conclude that the City's right impairs existing water rights. From the DOE estimates and actual experience of the appellants and others it appears that the drawdown effect of City No. 5 would not cause existing appropriators to deepen their wells beyond a reasonable or feasible pumping lift. The transfer from City No. 1 to City No. 5 of a water right for 350 gallons per minute (Certificate 369-A) should therefore be affirmed.

VI

There is need in this case for a determination of what the reasonable or feasible pumping lift is, for domestic and irrigation use, in this locality to serve as a guide for the future relationship of the parties and subsequent well developers. We have held that RCW 90.44.070 requires DOE to determine a range within which pumping lifts would be reasonable for domestic pumping developments before issuing a ground water permit which could affect a prior water right. Heer Brothers, supra, p. 8. In this case, however, we are persuaded that the instant municipal development will not place appellants close to the limit of such a range. Therefore, a condition should be added to DOE's approval of the transfer (Certificate 369-A) requiring that:

> This approval shall be subject to permittee's submitting evidence sufficient for DOE's determination of reasonable or feasible pumping lifts for existing domestic and irrigation

> rights. Such a determination shall be made for the locality concerned by the issuance of a regulatory order within a reasonable time after this approval.

We conclude that such a condition and determination by DOE would establish with necessary clarity the line between the rights of senior and junior appropriators in the locality in question, and that such a condition is required to conform this approval with RCW 90.44.070 and the public welfare clause of RCW 90.03.290. Such a determination should be made by reference to the criteria of DOE's rule regarding reasonable or feasible pumping lift, WAC 173-150-040.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The transfer of water right to City well No. 1 (Certificate 266-D) is hereby affirmed. The transfer of water right to City well No. 5 is hereby remanded for addition of the condition set out in Conclusion of Law VI, above, but is in all other respects affirmed.

DONE at Lacey, Washington, this 10th day of May, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Chairman

Judith A. Bendor
JUDITH A. BENDOR, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge